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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-285

STATE OF CALIFORNIA, et al.,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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OPINIONS BELOW

The decision of the U.S. Court of Appeals has not yet been officially reported, and is attached hereto. App. 1-16.

JURISDICTION

The final decision of the U.S. Court of Appeals was rendered on August 12, 1977. A petition for writ of certiorari is due on or before November 10, 1977. This Court has jurisdiction under 28 U.S.C. § 1257(3).

The decision of the U.S. Court of Appeals invalidates various California water laws, as applied to the U.S. Bureau of Reclamation, on grounds that such laws are repugnant to the Supremacy Clause. Hence, this petition might properly be considered an appeal, in which case this Court has jurisdiction under 28 U.S.C. § 1254(2).

QUESTIONS PRESENTED

Section 8 of the Reclamation Act of 1902 requires the U.S. Bureau of Reclamation (the "Bureau"), in operating federal reclamation projects, to "proceed in conformity with" state laws relating to the "control, appropriation, use, or distribution" of water. The questions raised in this petition are as follows:

1. Does section 8 require the Bureau, in acquiring its rights to unappropriated water for federal reclamation projects, to acquire such rights pursuant to the states' appropriation laws? Or, alternatively, does the Bureau acquire such rights under the "implied reservation" doctrine at the time that each federal reclamation project is authorized by Congress, notwithstanding the language of section 8?

2. If section 8 requires the Bureau to acquire its water rights under the states' appropriation laws, must the Bureau comply with conditions which the states attach to such water rights, to the extent that such conditions do not impair the congressionally-authorized purposes of federal reclamation projects?

3. If section 8 does not require the Bureau to acquire its water rights under the states' appropriation laws, must the Bureau nonetheless comply with state-imposed conditions attached to water rights which are held by the state, and which are assigned by the state to the Bureau?

4. If section 8 does not require the Bureau to acquire its water rights under the states' appropriation laws, must the Bureau nonetheless comply with conditions which the state attaches to the Bureau's water rights when the Bureau elects to acquire its water rights under the states' appropriation laws?

FEDERAL LAWS INVOLVED

This case involves an interpretation of section 8 of the Reclamation Act of 1902, 32 Stat. 390 (1902), 43 U.S.C. §§ 372, 383 (1970), a copy of which is attached hereto. App. 16.

STATEMENT OF THE CASE

The primary question raised in this case is whether section 8 of the Reclamation Act of 1902[1] requires the U.S. Bureau of Reclamation (the "Bureau"), in acquiring the right to appropriate unappropriated water for federal reclamation projects, to acquire such rights under the states' appropriation laws, and, if so, the extent to which the Bureau must comply with the states' appropriation laws.

1. Facts of the Case.

The Reclamation Act of 1902 authorizes federal construction and operation of federal reclamation projects in 16 western states.[2] Under the act, Congress has authorized many reclamation projects, the largest of which is a vast

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1. Section 8 provides:
"That nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the *laws of any State* or Territory relating to the *control, appropriation, use, or distribution of water* used in irrigation, or any vested rights acquired thereunder, and the *Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws*, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to or from any interstate stream or the waters thereof: Provided, that the right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right." 32 Stat. 390 (1902), 43 U.S.C. §§ 372, 383 (1970). (Emphasis added.)

2. The 16 states are Arizona, California, Colorado, Idaho, Kansas, Montana, Nevada, Nebraska, New Mexico, North Dakota, Oklahoma, Oregon, South Dakota, Utah, Washington and Wyoming. 32 Stat. 388 (1902).

array of dams, reservoirs and waterways in California collectively known as the Central Valley Project (CVP). See *Ivanhoe Irr. Dist. v. McCracken,* 357 U.S. 275, 280-284 (1958). One of the units of the CVP is the New Melones project, authorized in 1944 and re-authorized in 1962. 58 Stat. 887 (1944); 76 Stat. 1180, 1191 (1962). The waters of the CVP, including those of the New Melones project, arise and flow solely in California.

The Bureau, which will operate the New Melones project upon its completion, applied to California's State Water Resources Control Board (the "State Board") for the right to appropriate unappropriated water for the New Melones project. The right to appropriate water in California is evidenced by a permit issued by the State Board. Cal. Wat. Code §§ 1201, 1240, 1375. The State Board issues the permit if unappropriated water is available, and if the proposed use is "reasonable and beneficial." *Ibid.* Conditions may be inserted in the permit to insure that the proposed use is "reasonable and beneficial." *Ibid.* California's permit system is similar to that of other western states whose waters are utilized by the Reclamation Act of 1902.

The Bureau's application for water rights under California law took two forms. First, the Bureau applied directly to the State Board for its own appropriative permits. Second, the Bureau also requested the State Board to approve the assignment to the Bureau of permit applications previously filed by another State agency, the State Department of Finance; the latter agency had agreed to assign its applications to the Bureau subject to approval of the State Board. The advantage to the Bureau of obtaining an assignment of these permit applications is that, upon approval, the permit-holder would have an earlier priority date than could be obtained directly by the Bureau, and thus would have seniority over many competing appropriators.[3] In essence, the Bureau thus applied directly for its own water rights, and for the assignment of water rights held by a State agency under State law.

After extensive hearings, the State Board issued Decision 1422. This decision resulted in (1) the issuance of permits applied for directly by the Bureau, and (2) the issuance of permits applied for by the State Department of Finance, and approval of their assignment to the Bureau. However, the decision imposed conditions in all permits that, although allowing immediate impoundment of water for certain project purposes, deferred impoundment of water for agricultural, municipal and industrial purposes until the Bureau develops a plan for the use of such water. Basing its conclusions on the Bureau's own evidence, the State Board found that the Bureau had failed to develop such a plan. Until such a plan is developed, the State Board stated, the State Board is unable to find that the Bureau's proposed use is "reasonable and beneficial." Thus, the State Board did not deny the Bureau's right to water, but merely deferred the right until the Bureau develops a plan for the use of the water.

2. Positions of the Parties.

The United States filed this action in a federal district court, alleging that it is not bound by the conditions in Decision 1422. It alleged that the Bureau need not acquire its water rights under the states' appropriation laws. This position is consistent with the view, unexpressed in the United States' complaint, that the Bureau acquires its water rights under the "implied reservation" doctrine, since that doctrine

3. Under California law, an applicant's priority date depends on the date of his application, not the date that the application is approved. Cal. Wat. Code §§ 1450, 1455. The priority date of the permits held by the State Department of Finance is the year 1927, since its applications were filed in that year.

allows federal agencies to acquire water for use on federal lands without complying with the states' water laws.[4] The United States also alleged that, if the Bureau elects to acquire its water rights under state law as a matter of "comity," the state must issue an appropriative permit if unappropriated water is available and cannot impose any conditions in the permit.

California alleges that section 8 of the Reclamation Act of 1902 requires the Bureau to acquire its water rights under the states' appropriation laws. Under this view, the Bureau does not acquire its water rights under the "implied reservation" doctrine. California alleges that, under section 8, the Bureau is bound by conditions which a state attaches to the

4. Under the "implied reservation" doctrine, Congress has constitutional authority under the Property Clause to reserve unappropriated water for use on federal lands that it withdraws from the public domain, and presumptively intends to exercise that authority at the time that it withdraws such lands from the public domain. See, *e.g.*, *Cappaert v. United States*, 426 U.S. 128, 138-142 (1976). This Court has suggested that Congress lacks constitutional authority to override state laws in the reclamation field. *Kansas v. Colorado*, 206 U.S. 46, 92 (1907) ("We do not mean that its [Congress'] legislation can override state laws in respect to the general subject of reclamation"). Even assuming that Congress has such constitutional authority, the question remains whether Congress intends to exercise such authority. Section 8 clearly indicates that Congress does not mean to exercise this authority, for it requires the Secretary of the Interior to acquire his water rights for reclamation projects under state law. Indeed, the "implied reservation" doctrine has only been applied in cases where water is used *on* federal lands for traditional federal purposes, and the courts should be hesitant to extend the doctrine to situations where, as here, water is ultimately used *off* federal lands by non-federal users.

An additional question raised in this case is whether the "implied reservation" doctrine is even applicable to lands which the federal government acquires by purchase or condemnation, rather than withdraws from the public domain. The doctrine has been held applicable only when the federal government "withdraws its lands from the public domain." *Cappaert v. United States, supra* at 138. The lands for the New Melones project, however, were not withdrawn from the public domain, but were acquired by purchase and condemnation. See Defendants' Exh. 3.

water right granted to the Bureau, to the extent that such conditions do not impair the purposes of the federal reclamation project. California alleges that the conditions in the permits issued under Decision 1422 do not impair the purposes of the New Melones project. California also alleges that, regardless of the effect of section 8, the Bureau is bound by conditions imposed in state-created water rights which are held by the state, and which are assigned to the Bureau at its request.

3. Ninth Circuit's Decision.

The federal district court granted summary judgment for the United States. 403 F. Supp. 874 (E.D. Cal. 1975). On appeal, the Ninth Circuit ruled that section 8 requires the Bureau to comply with the "forms" of state law by obtaining an appropriative permit from the State Board, thus rejecting the United States' position that it acquires its water rights independently of state law. App. 6-7. However, the court ruled that the state must grant the permit if unappropriated water is available; it rejected California's position that the Bureau must comply with conditions in state-issued permits to the extent that such conditions are not inconsistent with the purposes of the federal project. App. 6-7. The court also ruled that the Bureau is not bound by conditions in permits which are granted to a State agency and assigned to the Bureau at the latter's request. App. 12-16. Accordingly, it was held, the Bureau need not comply with the conditions in Decision 1422.[5] The court did not consider whether the conditions were consistent with the purposes of the New Melones project.

5. The decision was written by the senior judge of the panel. A second judge wrote a concurring opinion. App. 7-8. The third judge wrote a concurring and dissenting opinion, arguing that the Bureau need not even obtain a permit under state law. App. 8-11.

REASONS FOR GRANTING THE WRIT

1. The Lower Court's Decision Alters Several Decades of Settled Administrative Practice, and Has an Enormous Impact on the Western States Whose Waters Are Utilized by the Reclamation Act of 1902.

This is a case of historic significance in the field of federal and state water relations. For three quarters of a century, the Bureau and its predecessor agencies have complied with the appropriation laws of the western states, and with the permit systems that underlie these laws, in acquiring the right to appropriate unappropriated water for federal reclamation projects.[6] In California, for example, the Bureau has acquired 41 appropriative permits, each containing conditions, since 1925; it has, until recently, consistently complied with the conditions in the permits. See Defendant's Exhs. 1, 9, 9(a), 9(b). The Secretary of the Interior and the Bureau have frequently expressed the view that section 8 of the Reclamation Act of 1902 *requires* the Bureau to comply with the states' appropriation laws in acquiring its water rights. See n. 6, *supra*. For example, the Commissioner of Reclamation stated in 1975:

> "Each state has the duty to determine under its own statutes how its unappropriated water is to be used.

6. See *e.g.*, Defendant's Exhs. 1, 9, 9(a), 9(b); Hearings on S. 1275 before Subcommittee on Irrigation & Reclamation, Sen. Comm. on Int. & Ins. Affairs, 88th Cong., 2d Sess. 322, 323 (1964); *United States v. Gerlach Live Stock Co.*, 339 U.S. 725, 735 nn. 9, 15 (1950).

As early as 1905, the Reclamation Service, the predecessor of the Bureau, reviewed the various appropriation laws of the states, and concluded that the Reclamation Service "must conform to the law and the regulations [of the states] in all particulars so far as it is possible under the operations of the reclamation act." U. S. Department of the Interior, *Proceedings of Second Conference of Engineers of the Reclamation Service* 222 (1905). In 1952, the Secretary of the Interior stated that "the rights of the United States to store, divert, and use water under the law of California . . . have their inception in certain applications . . . which have been or are to be assigned . . . to the United States, [and] in certain applications made by the United States itself." H.R. Doc. No. 416, 84th Cong., 2d Sess. 810-812 (1956).

> Since 1902, the Bureau has consistently taken the position that it will obtain under state law its rights to store and divert water for its projects recommended for Congressional authorization." Defendant's Exh. 13, p. 4.

In this case, however, the United States seeks to reverse this historic practice. It argues that section 8 does *not* require the Bureau to acquire its water rights under state law, and that the Bureau acquires its water rights independently of state law. The United States thus seeks to alter the historic relationship that has guided federal and state agencies in the reclamation field since 1902.

The Ninth Circuit's decision rejects the positions of both the United States and California. It rejects the United States' position that the Bureau acquires its water rights independently of state law, holding that the Bureau must acquire its water rights under state law. However, it rejects California's position that the Bureau must comply with conditions which the states attach to the Bureau's water rights. The decision thus effectively frees the Bureau of all conditions on its state-issued water rights in the western states, conditions with which, in California, the Bureau has complied since 1925. The decision thus alters several decades of settled administrative practice.

The Ninth Circuit's decision, if left standing, will have an enormous impact on the western states whose waters are utilized under the Reclamation Act of 1902. These states have adopted appropriation laws, consisting of permit systems, that allow the states to impose conditions on state-issued water rights that are necessary to protect the "beneficial use" of water. The power to impose conditions is the power to participate in determining the use and allocation

of water from federal reclamation projects.[7] It is critically important to these states that they participate in such determinations. Water from federal reclamation projects is not used on federal lands for traditional federal purposes, as in those cases which have recognized federal water rights under the "implied reservation" doctrine. See n. 4, *supra*. Rather, this water is ultimately used off federal lands by economic and municipal entities—farmers, industries, cities and villages—whose activities are linked with the growth and development of the states. Moreover, the western states have traditionally controlled the use of water by these entities. See n. 10, *infra*.[8] Thus, the states have a vital interest in the use and distribution of water from federal reclamation projects. California is vitally interested, for example, in whether water from the Central Valley Project is used to promote urban growth in its congested metropolitan areas or to promote agricultural production in its interior valleys.

It is not uncommon for Congress, in authorizing a federal reclamation project, to decide where, or for what purposes, project water should be used, or how much water should be impounded. We do not assert the power to alter these or

7. In this case, however, California does not seek to control the use and allocation of water, but only seeks to require the Bureau to develop a plan for the use of water before fully impounding the project's waters.

8. In California, for example, the State Board has issued other decisions, Decisions 1379 and 1400, that impose conditions in permits issued to the USBR that require the release of water from upstream storage facilities in order to protect downstream economic and ecological interests threatened by salinity intrusion, and in order to insure sufficient flows of water to protect downstream fish and wildlife. The allocation of water for these purposes is a question that is of vital importance in California, but was not addressed by Congress in authorizing the various units of the Central Valley Project.

other congressional decisions. Rather, we assert only the power to make decisions that have not been made by Congress, and that do not impair the purposes of its reclamation projects. The Ninth Circuit held that the states lack this limited, but vital, power. Its decision thus prevents the states from having a voice in decisions that affect their destiny, even where Congress has not spoken.

Although the Ninth Circuit rejected the United States' position that the Bureau acquires its water rights independently of state law, the United States' position, if accepted, would make it difficult for the western states to effectively manage their water resources. The states' appropriation laws, consisting of their permit systems, not only allow the states to participate in determining the use and allocation of project water; these systems also enable the states, by using efficient administrative procedures, to quantify the amount of unappropriated water that should be allocated to an applicant for a water right, and thus to quantify the amount of unappropriated water that remains available for use by others. However, if the Bureau need not comply with the states' permit systems, the states would be unable to administratively quantify the amount of unappropriated water that should be allocated to the Bureau. The only alternative method for quantifying the Bureau's rights would be by an adjudication of the Bureau's rights in relation to those of competing users, a process which is invariably protracted. See, *e.g.*, *Arizona v. California*, 373 U.S. 546 (1963). The states would thus lack a ready, efficient method for quantifying the amount of unappropriated waters that are available for use by non-federal users. They would lack information that is necessary in determining whether to grant or deny new applications for water

rights, and thus would be unable to properly allocate their waters. Moreover, non-federal users who have already acquired appropriative rights would have no assurance that the Bureau might not subsequently claim the water necessary to satisfy their rights, on grounds that the Bureau acquired senior rights to an unquantified amount of water under the "implied reservation" doctrine. Thus, the United States' position would inject confusion and uncertainty into western water law, a result that has been avoided because of the Bureau's historic practice of acquiring its water rights under the states' appropriation laws.

Therefore, this is a case of historic significance that will determine whether federal and state officials are to embark on a new, uncharted course in the field of reclamation, or are to continue on the same course that has been followed since 1902. The case thus merits the attention of this Court.

2. The Lower Court's Decision Is Inconsistent with, and Ignores, the Legislative History and Administrative Interpretation of Section 8.

Section 8 of the Reclamation Act of 1902 requires the Secretary of the Interior, in operating federal reclamation projects, to "proceed in conformity with" state laws relating to the "control, appropriation, use, or distribution" of water. See n. 1, *supra*. The section, on its face, thus requires federal compliance with the states' "appropriation" laws. Under the states' appropriation laws, the states grant a water right, consisting of a permit, to a water appropriator who proposes to put water to a beneficial use, and attach conditions to the right to insure that the proposed use is, and remains, beneficial. Thus, section 8 requires federal compliance with the states' permit systems.

This conclusion is supported even more strongly by the legislative history of section 8. During the 1902 congressional debates, section 8 was opposed by representatives who argued that, if the federal government is to build and operate the projects, it should control the appropriation, use and distribution of project water. See, *e.g.*, 35 Cong. Rec. 6696, 57th Cong., 1st Sess. (1902) (remarks of Rep. Ray). The section was supported, however, by other representatives who argued that, since the western states would be vitally affected by the projects, the states should control the appropriation, use and distribution of water. See *e.g.*, *id.* at 6677-6679 (remarks of Rep. Mondell).[9] The latter group emphasized that the western states had traditionally controlled the use of water by non-federal users (even on federally-owned public domain lands) under congressional

9. Senator Clark, the chief spokesman for the reclamation bill in the Senate, stated:

> "But in the distribution of these waters . . . it is right and proper that the various States and Territories should control in the distribution." 35 Cong. Rec. 2222.

Representative Mondell, the chief spokesman for the reclamation bill in the House of Representatives, commented at length on the meaning of section 8. He stated that "Section 8 follows the well-established precedent in national legislation of recognizing local and state laws relative to the appropriation and distribution of water," that under the bill "the Secretary of the Interior would proceed to make the appropriation of the necessary water by giving the notice and complying with the forms of law of the State or Territory in which the works were located," and that the section is consistent with the acts of 1866, 1870 and 1877 in "recognizing the control of the States over the use of waters within their borders." *Id.* at 6678, 6679.

Other congressmen made similar comments. For example, Representative Burkett stated that, under section 8, "distribution should be . . . regulated and controlled by State laws and by State boards of engineers." *Id.* at 6728.

This view was also supported by President Theodore Roosevelt, who stated that "the distribution of water, the division of the streams among irrigators, should be left to the settlers themselves, in conformity with State laws . . ." *Id.* at 6775.

acts passed in 1866, 1870 and 1877,[10] and argued that the states should have equivalent control over water ultimately made available to non-federal users under the 1902 act; as state laws were the source of water rights under the pre-1902 act, they should be the source of water rights under the 1902 act as well. See n. 9, *supra*. The latter group prevailed, and section 8 was included in the act as passed. No senator or congressmen suggested that section 8 would have any effect other than providing for broad state control of water under the 1902 Act. The Ninth Circuit's decision, by denying the states any discretionary control of such water, is consistent with the result that was favored by the congressional opponents of section 8, and that was rejected by Congress as a whole.

The Ninth Circuit ignored this legislative history. It equally ignored the historic administrative practice of the Bureau in complying with the states' permit systems. The court instead rested its decision primarily on this Court's recent companion decisions in *Hancock v. Train*, 426 U.S. 167 (1976), and *Environmental Protection Agency (EPA) v. California*, 426 U.S. 200 (1976), involving interpretations of the Clean Air Act and the Federal Water Pollution Control Act. In *Hancock* and *EPA*, it was held that the states, which are authorized under the acts to adopt permit programs for the control of air and water quality, cannot apply their permit programs to federal agencies, because such

10. The Mining Act of 1866, as amended in 1870, and the Desert Land Act of 1877 "severed" the water from the public domain lands of the western states, and required non-federal water users on the public domain lands to comply with state appropriation laws even though they acquired their lands under federal law. Thus, the acts gave the states broad, even "plenary," control over the use of water on non-federal lands. See *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142 (1935); *Jennison v. Kirk*, 98 U.S. 453 (1878).

authority was not spelled out in "clear and unambiguous" terms. 426 U.S. at 179, 211. Neither case involved an interpretation of section 8. Ignoring that distinction, the Ninth Circuit held that, since section 8 does not specifically refer to the states' permit systems, the section does not require federal compliance with the states' permit systems. If this is so, it is difficult to understand the basis for the court's conclusion that the section requires federal compliance with the "forms" of the states' permit systems.

More importantly, section 8 clearly and unambiguously requires federal compliance with the states' permit systems. The legislative history and administrative interpretation of the section indicate that the Bureau must comply with the states' appropriation laws; since the states' permit systems are the essence of their appropriation laws, the only way that this congressional objective can be realized is by federal compliance with the permit systems. This Court has stated, more than once, that a statute must be interpreted consistently with its legislative history, see, *e.g., Train v. Colorado Pub. Int. Res. Group*, 426 U.S. 1 (1976), and that weight must be given to the administrative interpretation of a statute, see, *e.g., Udall v. Tallman*, 380 U.S. 1 (1976). The Ninth Circuit reached its result only by ignoring those rules of statutory construction. It overturned a clearly-stated congressional objective only because Congress did not think to mention the precise procedures by which this result would be accomplished, procedures that were then in a state of development. However, this Court recently observed that, as Justice Holmes remarked, "We are not free to say to Congress 'We see what you are driving at, but you have not said it, and therefore we shall go on as before.'" *Rosebud Sioux Tribe v. Kneip*, ... U.S. ....., 45 U.S.L.W. 4349 (1977).

The Ninth Circuit appeared to assume that the *Hancock* and *EPA* decisions establish a rule of law that operates independently of the normal guides to statutory analysis. That assumption finds no support in the *Hancock* and *EPA* decisions, however. There, the Court stated that the legislative history in question supported the position of the federal agencies rather than the states, 426 U.S. at 187-190, 215, and that its decisions were consistent with the administrative practice of federal agencies under the acts, *id.* at 226-227. Thus, the decisions do not support the Ninth Circuit's decision, and are not relevant here.

3. The Lower Court's Decision Conflicts with This Court's Analysis in the Nebraska, Ivanhoe and City of Fresno Decisions.

In *Nebraska v. Wyoming*, 295 U.S. 40 (1935), this Court described the effect of section 8 as follows:

> "All of the acts of the Reclamation Bureau in operating the reservoirs so as to *impound and release* waters of the river are *subject to the authority of Wyoming*. . . . [T]he Secretary and his agents, acting by authority of the Reclamation Act and supplementary legislation, must obtain *permits* and priorities for the use of water from the State of Wyoming in the same manner as a private appropriator or an irrigation district formed under the state law." *Id.* at 42, 43. (Emphasis added.)

Substantially the same language was repeated in *Nebraska v. Wyoming*, 304 U.S. 545, 629 (1945). The Ninth Circuit's decision is inconsistent with these decisions.

This Court has limited the effect of state law under section 8 in instances where state laws conflict with a specific provision of federal reclamation law. In *Ivanhoe Irr. Dist. v. McCracken*, 357 U.S. 275, 291 (1958), it was held that, notwithstanding section 8, state law cannot override the

"specific and mandatory" provisions of section 5 of the Reclamation Act of 1902, which limits the availability of water under the act to lands not in excess of 160 acres.[11] In *City of Fresno v. California*, 372 U.S. 627 (1963), it was held that, notwithstanding section 8, state law cannot prevent the Bureau from exercising its powers under section 7 of the Reclamation Act of 1902 to acquire water rights by condemnation.[12] These cases indicate that state law must yield when it conflicts with a "specific and mandatory" federal reclamation law, notwithstanding section 8. This result is consistent with the rule that, in conflicts between a general statute (such as section 8) and a specific statute (such as a specific federal reclamation law) concerning the same subject matter, the specific statute controls. See, *e.g.*, *Preiser v. Rodriguez*, 411 U.S. 475, 488-490 (1973).

In this case, however, there is no conflict between state law and federal law. Nothing in federal law authorizes the Bureau to acquire unappropriated water without complying with state law; in fact, the only provision authorizing the Bureau to acquire unappropriated water—section 8—specifically mandates it to comply with state law. Further, nothing in federal law precludes a state from deferring the

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11. The Court stated:
> "Without passing generally on the coverage of § 8 in the delicate area of federal-state relations in the irrigation field, we do not believe that the Congress intended § 8 to override the repeatedly reaffirmed national policy of § 5." *Id.* at 292.

The State of California joined with the United States in urging that state law could not override the acreage limitation in § 5, prompting the court to observe that "there is no clash here between the United States and the State of California." *Id.* at 279.

12. The Court stated:
> "Section 8 does not mean that state law may operate to prevent the United States from exercising the power of eminent domain to acquire the water rights of others." *Id.* at 630.

acquisition of such water by the Bureau until it develops a plan for the use of the water. Hence, there is no conflict between the conditions in Decision 1422 and the purposes of the new Melones project. Nor does the United States argue otherwise; in fact, it concedes that it is barred from making such an argument. App. 9. Thus, the analysis in the *Ivanhoe* and *City of Fresno* cases, coupled with the analysis in the two *Nebraska* decisions, affirms the validity of the conditions in Decision 1422. The Ninth Circuit's decision, which fails to consider whether the conditions are inconsistent with specific federal laws or specific project purposes, thus conflicts with the analysis in all these decisions.

4. The Lower Court's Decision Results in the Creation of a New Water Doctrine That Is Unsupported by the Reclamation Act of 1902.

The Ninth Circuit's decision results in the creation of a new, aberrational water doctrine, one that is without precedent in western water law. This new doctrine, based on section 8, requires the Bureau to acquire a water right under state law, but not to comply with conditions attached to the water right. As noted by this Court, there are three major types of water rights in the western states: appropriative rights, riparian rights and reserved (or "implied reservation") rights. See *United States v. District Court*, 401 U.S. 520, 524 (1971). The water right which the Bureau must acquire under the majority opinion, however, does not fall into any of these categories. Since the Bureau must acquire a state-issued water right, it does not have a reserved right. Since it need not comply with conditions attached to the right, it does not have an appropriative right. Thus, the majority opinion results in the judicial

creation of a fourth type of water right, one that is a blend of an appropriative right and a reserved right. If such a water right is to be judicially created, certainly its genesis deserves to come from the nation's highest judicial body.

It is difficult to understand how section 8 supports the creation of the new water doctrine suggested by the Ninth Circuit. As nothing in the section specifically refers to a permit, nothing therein can be construed to support a distinction between a permit and its conditions. Hence, if the section is sufficiently "clear and unambiguous" to require federal acquisition of a permit, it is sufficiently "clear and unambiguous" to require federal compliance with conditions in the permit. Thus, it can logically be concluded only that the Bureau must fully comply with state permit systems, or that it is wholly immune from such systems; it cannot logically be concluded that the Bureau must comply half-way with these systems, as the Ninth Circuit has done. The lower court's decision thus represents more a judicial rather than a legislative philosophy of reclamation.

Judge Wallace, in his concurring and dissenting opinion, correctly notes that the majority opinion results in the development of a new "federal common law," and expresses doubts whether the court should engage in "judicial rulemaking in an area as complex and sensitive as state-federal relations over water." App. 10. He also recognizes that the United States' position would result in "great potential for uncertainty," because of the states' inability to quantify their unappropriated water under that position. App. 9-10. However, he embraces the United States' position "with reluctance," because he believes that this Court's recent decisions in *Hancock* and *EPA* offer no other choice. App. 8. The resulting "problem," he writes,

will have to be changed by Congress. App. 11. Judge Wallace's observations show how a rigid application of the *Hancock* and *EPA* analysis in this case leads to a dilemma, in that the court must either re-write federal reclamation law or embrace a concededly harmful result that requires legislative correction. The majority chose the former, and Judge Wallace the latter.

There is another judicial recourse that avoids the dilemma posed by Judge Wallace. Section 8 should be interpreted as requiring the Bureau to comply with state appropriation laws, including state permit systems, but only to the extent that the purposes of federal reclamation projects are unimpaired. This approach fully protects the federal interest in reclamation, by insuring that the states cannot interfere with that interest. It also protects the state interest in reclamation, by allowing the states to act in instances where the federal interest is neutral. Above all, it gives meaning to both the letter and spirit of section 8, by respecting the accommodation between federal and state interests worked out by Congress in 1902. Thus, this approach does not attempt to re-write the federal reclamation laws, as does the majority opinion below, or reach a concededly harmful result that will have to be rectified by Congress, as does Judge Wallace's opinion.

This suggested approach is consistent with this Court's decisions in the two *Nebraska* cases, where the Court stated that the Bureau must obtain permits under Wyoming law and that the "impound[ment] and release [of water] . . . is subject to the authority of Wyoming." 295 U.S. at 42, 43. This approach is also consistent with this Court's analysis in the *Ivanhoe* and *City of Fresno* cases, where the Court held that the states' authority under section 8

is subject to the "specific and mandatory" provisions of federal reclamation law. 357 U.S. at 291. This approach is essentially an application of the doctrine of preemption in the interpretation of section 8.[13] That is, a state law should be upheld to the extent that it is not preempted by a specific act of Congress, including the specific purposes of its reclamation projects. In applying the preemption doctrine, the Court frequently interprets federal statutes in a manner that avoids state intrusions on federal interests, and yet accommodates state interests to the extent that no such intrusions occur. The same approach should be followed in interpreting section 8. This approach respects history, and does not attempt to re-write it.

5. By Voiding Conditions in State-Held Water Rights Assigned to the Bureau, the Court Has Sanctioned an Unconstitutional Violation of California's Property Rights.

The Ninth Circuit held that the Bureau is not bound by conditions attached to water rights held by an agency of the State of California, and assigned by California to the Bureau at its request. The question is one of importance, for a substantial portion of the water rights held by federal agencies in California are based on similarly-assigned

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13. Under the preemption doctrine, assuming that Congress has not occupied the field, a state law is invalid if it conflicts with a specific federal law. See, *e.g.*, *New York State Dept. of Social Services v. Dublino*, 413 U.S. 405 (1973); *Goldstein v. California*, 412 U.S. 546 (1973). This Court has recently shown greater willingness to sustain state laws against challenges that they have been preempted by federal laws, now requiring "a flexible conception of federal-state relations rather than one of absolute federal supremacy." Note, "The Preemption Doctrine: Shifting Perspectives on Federalism and the Burger Court," 75 *Colum. L. Rev.* 623, 641 (1975). In particular, federal laws will not be deemed to preempt a field "traditionally occupied by the States" in the absence of a "clear and manifest purpose of Congress." *Jones v. Rath Packing Co.*, ... U.S. ....., 45 U.S.L.W. 4323, 4324 (1977).

water rights.[14] This question is one that has never been addressed by this Court.

According to the Ninth Circuit, the State agency's rights were inchoate at the time that they were assigned to the Bureau, since the rights were based on applications that were not yet approved by the State Board; the rights were not perfected until the State Board approved the applications, and at that time the rights were held by the Bureau. The court stated that, at the time that the assigned applications were approved, the Bureau "was acting in the same capacity as when it filed its own applications," and that its "substantive rights arose from the Congressional legislation, not from the assignment." App. 14. Hence, the court concluded, the Bureau is not subject to conditions attached to the approved applications. App. 12-16.

However, the decision overlooks the fact that the right assigned to the Bureau, however inchoate, has the incident of an early priority date, based on the year—1927—that the State agency filed its applications. This early priority date is an important feature of the perfected right now held by the Bureau, for it enables the Bureau to defeat the claims of competing water users with post-1927 priority dates. This important feature is a product of state law, not federal law. Federal law, at most, authorizes the Bureau to obtain a priority date based on the date of its *own* applications, even assuming that it is not bound by conditions in state-issued permits. However, federal law clearly

14. The total amount of water which is subject to State-filed applications assigned to federal agencies in California, and hence subject to *potential* use, is approximately 9,000,000 acre-feet in storage. The total amount of water *actually* used by the Bureau in the CVP in 1972 was approximately 6,000,000 acre-feet. The total amount of water actually used by *all* users in California in 1972 was approximately 27,000,000 acre-feet. Memorandum, "Water Supply and Water Rights Data," Governor's Commission to Review California's Water Rights Law, August 4, 1977.

does not authorize the Bureau to obtain an earlier priority date based on the applications of the State itself. The Bureau can acquire the latter benefit only by electing to acquire its water rights under state law, independently of its rights under federal law. The Bureau could not have obtained the 1927 priority date without obtaining the assignments. Hence, the decision is fundamentally wrong in stating that the Bureau's "substantive rights arose from the Congressional legislation, not from the assignment." App. 14. It rights arose directly from the assignments. Therefore, as an assignee, the Bureau could not obtain greater rights than were held by the assignor, the State agency. It is thus limited by conditions in the permit, just as the assignor would have been.

The Ninth Circuit has confused the difference between a water right acquired by the Bureau under *federal* law pursuant to section 8, and a water right acquired under *state* law independently of section 8. If it elects to obtain one such right, it cannot obtain the benefits of the other. If it acquires a right under federal law, it obtains a permit free of conditions, according to the court's decision; however, it cannot obtain the 1927 priority date that belongs to the State. Conversely, if it acquires an assigned right under State law independently of section 8, it obtains the 1927 priority date, but is bound by conditions which the State attaches to the right. The Ninth Circuit's decision awards the Bureau the benefits of both federal and state law, by allowing the Bureau to obtain a condition-free permit with a 1927 priority date. Thus, the Bureau is allowed to gain the benefit of a right that belongs to the State, without complying with the burdens which the State attaches to the right.

This result sanctions an unconstitutional invasion by the federal government of the property rights held by the

State of California, a result which should not be tolerated by a Court which has recently reaffirmed the states' immunity from such invasions. See *National League of Cities v. Usery*, ... U.S. ....., 44 U.S.L.W. 4974 (1976). This result allows a federal agency to acquire a valuable property right held by the State without complying with State-imposed limitations on the right, simply because the right is "inchoate" at the time of its acquisition. However, the inchoate nature of the right is irrelevant. It is only relevant that the right is valuable, and belongs to the State. Suppose, for example, that a state holds an option to buy a building, and agrees to sell the option to a federal agency on condition that the federal agency complies with the state's zoning laws. Clearly the federal agency is constitutionally required to comply with the state's zoning laws if it purchases the option, notwithstanding the inchoate nature of the option. This is not to suggest that the federal agency may lack authority to independently acquire the building under its constitutional powers, and thus avoid the encumbrance of the state's zoning laws. However, if the federal agency elects to proceed under state law in order to gain the benefits of that law, it is clearly bound by the encumbrances of state law. Such is the constitutional imperative of the Tenth Amendment. Cf. *United States v. Gerlach Live Stock Co.*, 339 U.S. 725, 736, 739, 742 (1950).[15]

15. The court's decision was premised on several incorrect statements of the record. For example, the court stated that, "when the State applied for water rights *in 1952*," Congress had already authorized federal construction of the project, an event which occurred in 1944. App. 15. (Emphasis added.) Accordingly, the court stated, the State agency filed its applications in the expectation that they would be assigned to the Bureau. App. 14-15. In fact, the State agency filed its applications in 1927, not 1952. Defendant's Exh. 1, p. 1. At the time that the applications were filed, it was expected that the projects would be built by the State rather than the federal government, and hence it was not expected that the applications would be assigned to the Bureau.

CONCLUSION

For the foregoing reasons, it is respectfully requested that the petition for writ of certiorari be granted.

Respectfully submitted,

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Further, the court stated that the applications of the State Department of Finance "were assigned by the Department to the Bureau of Reclamation," and that "there is no contention that the assignment was expressly conditioned upon acceptance of whatever permit conditions the State might impose." App. 13-14. However, this statement overlooks the fact that the assignments did not become effective until their approval by the State Board, at which time the State clearly expected that the Bureau would be bound by the conditions therein. Moreover, the Bureau, in applying to the State Board for approval of the assignments, expressly agreed that the resulting permits "shall include the enumeration of conditions therein which in substance shall include all of the provisions of this article," and that the permit shall be effective insofar as it is "in conformity with this division of the [California] Water Code." Defendant's Exh. 3(a), 3(b).

Appendix 1

Filed—Apr 1 1977
Emil E. Melfi, Jr.
Clerk, U.S. Court of Appeals

United States Court of Appeals
for the Ninth Circuit

United States of America, Plaintiff-Appellee, vs. The State of California, State Water Resources Control Board, W. W. Adams, Chairman, Ronald B. Robie, Vice Chairman, Roy E. Dodson, Jean Auer, and W. Don Maughan, as members of the State Water Resources Control Board, Defendants-Appellants.	No. 75-3554

OPINION

Appeal from the United States District Court for the Eastern District of California

Before: DUNIWAY, CARTER and WALLACE, Circuit Judges

DUNIWAY, Circuit Judge:

The State of California and its State Water Resources Control Board appeal from a judgment for the United States entered by the District Court for the Eastern District of California. The opinion and judgment of that court

are reported in *United States v. State of California*, E.D. Cal., 1975, 403 F. Supp. 874. The judgment of the district court appears at 403 F. Supp. 902-03. The principal questions are (1) whether Section 8 of the Reclamation Act of 1902, 32 Stat. 388, now 43 U.S.C. § 383, requires that the United States apply to the California State Water Resources Control Board for a permit to appropriate unappropriated water from the Stanislaus River for the New Melones project, and, (2) if so, what conditions, if any, the Board can attach to a permit that it grants. The questions are of great importance, and we have given them careful attention.

Our study of the record and the law convinces us that the judgment must be affirmed, substantially for the reasons stated by Judge MacBride in his opinion.

Two recent decisions of the Supreme Court strengthen our conviction. In *Hancock v. Train*, 1976, 426 U.S. 167, the question was whether § 118 of the Clean Air Act, 42 U.S.C. § 1857f, permits a state to require federally owned or operated installations to obtain a permit to operate, as required by the state's federally approved plan for assuring air quality. The pertinent language of § 118 reads:

> Each department, agency, and instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result in the discharge of air pollutants, shall comply with federal, State, interstate, and local requirements respecting control and abatement of air pollution to the same extent that any person is subject to such requirements.
> 42 U.S.C. § 1857f.

The Court states its holding as follows:

> Kentucky, like the Court of Appeals for the Fifth Circuit in *Alabama v. Seeber*, 502 F.2d 1238, 1247-1248 (1974), finds in § 118 a sufficient congressional authorization to the States, not only to establish the amount of pollutants a federal installation may discharge, but also to condition operation of federal installations on securing a state permit. We disagree because we are not convinced that Congress intended to subject federal agencies to state permits. We are unable to find in § 118, on its face or in relation to the Clean Air Act as a whole, or to derive from the legislative history of the Amendments any clear and unambiguous declaration by the Congress that federal installations may not perform their activities unless a state official issues a permit. Nor can congressional intention to submit federal activity to state control be implied from the claim that under Kentucky's EPA-approved implementation plan it is only through the permit system that compliance schedules and other requirements may be administratively enforced against federal installations. *Id.* at 180-81.
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> • • • •
>
> In view of the undoubted congressional awareness of the requirement of clear language to bind the United States, our conclusion is that with respect to subjecting federal installations to state permit requirements, the Clean Air Act does not satisfy the traditional requirement that such intention be evinced with satisfactory clarity. Should this nevertheless be the desire of Congress, it need only amend the Act to make its intention manifest. *Id.* at 198 (footnotes omitted).

In *Environmental Protection Agency v. California ex rel. State Water Resources Control Board*, 1976, 426 U.S. 200, the Court reached a similar conclusion as to the effect of § 313 of the Water Pollution Control Act Amendments of 1972, 86 Stat. 816, 33 U.S.C. § 1323. That section provides that federal installations must "comply with Federal, State, interstate, and local requirements respecting control and

abatement of pollution to the same extent that any person is subject to such requirements." California and Washington sought to apply the permit requirements of their programs. We held that they could do so (511 F.2d 963), but the Supreme Court reversed. Applying the principles of *Hancock, supra*, the Court said:

> Our decision in this case is governed by the same fundamental principles applied today in *Hancock v. Train, ante*, at 179: federal installations are subject to state regulation only when and to the extent that congressional authorization is clear and unambiguous. *Id.* at 211.
>
> Except for the reference to service charges, § 313 is virtually identical to § 118 of the Clean Air Act, 42 U.S.C. § 1857f. Taken alone, § 313, like § 118 of the Clean Air Act, states only to what extent—the same as any person—federal installations must comply with applicable state requirements. Section 313 does not expressly provide that federal dischargers must obtain state NPDES permits. Nor does § 313 or any other section of the Amendments expressly state that obtaining a state NPDES permit is a "requirement respecting control or abatement of pollution."
>
> *Id.* at 212-13 (footnote omitted).

The language of § 8 of the Reclamation Act of 1902, set out in the opinion of the district court, 403 F. Supp. 885, is no more specific in subjecting federal projects to state permit requirements than are the statutes construed in the foregoing cases. Our view that the judgment in this case should be affirmed is, we think, supported by the principles applied in those cases. Indeed, we find that California's claim in this case that the United States must obtain a permit and comply with conditions embodied in it is less

supportable than the claims of Kentucky in *Hancock, supra*, and of California and Washington in *Environmental Protection Agency, supra*. In each of those cases, it could more plausibly be argued that Congress did intend to subject federal installations to state permit requirements than in this case. When the Congress enacted § 118 of the Clean Air Act and § 313 of the Water Pollution Control Act Amendments of 1972, the use by the states of the permit device as a means of enforcing their laws in these areas was well known. The language of the two Acts, subjecting federal instrumentalities to state laws, is very broad. Yet the Court declined to read either section as requiring compliance with state permit requirements.

On the other hand, when § 8 of the Reclamation Act was adopted in 1902, California's permit requirement did not exist. At that time, under the Civil Code of 1872, §§ 1410-1422, surplus water was appropriated by the physical act of taking and diverting it to beneficial use. An appropriator could post a notice of taking at the point of diversion and record a copy with the county recorder. If the appropriator was diligent in completing the work for the diversion, his rights would date back to the posting of the notice. The statute did not create appropriative rights; it merely provided evidence of the date of appropriation. *A fortiori*, then, we cannot read § 8 as requiring compliance with California permit requirements that did not exist when § 8 was adopted.

In 1913, California enacted the Water Commission Act (Cal. Stats. 1913, c. 586) which created the State Water Commission and provided a statutory procedure that could be followed in the appropriation of unappropriated water flowing in any natural channel "for useful and beneficial

purposes." The Act became effective, following a referendum vote, in 1914. In 1923, an amendment made the statutory procedure the exclusive method of appropriating water. (Cal. Stats. 1923, c. 87.) The Act, as amended, is now part of the California Water Code, Divisions 1 and 2.

As the district judge concluded, a major purpose of § 8 of the 1902 Act was to recognize and protect state water law, particularly the state law doctrine of appropriative rights to water. 403 F. Supp. at 888. Similarly, the Clean Air Act and the Water Pollution Control Act amendments give effect to state law and require compliance with it by federal installations. Indeed, those acts are more specific than § 8 of the 1902 Act. Yet the Court has declined to read them as subjecting federal installations to state permit requirements, even though the use of permits by the states as a means of enforcing their clean air and water pollution laws was known. To read § 8 of the 1902 Act as requiring compliance with laws that did not then exist and procedures not made compulsory by California until 1923—over 20 years later—would fly in the face of the *Hancock* and *Environmental Protection Agency* decisions. We could only do so if the language of § 8 were much more specific than it is.

In one respect, however, we disagree with Judge MacBride's decision. He says, 403 F. Supp. 889-90:

> Indeed, while the Congressional history of the 1902 Act indicates broad federal purpose and authority in the operation and control of federal reclamation projects, the comity inherent in a federal system would not permit an overbroad usurpation of state sovereignty. Accordingly, the federal government is required, when acquiring water for federal reclamation projects, to comply with the forms of state law, including application to state water boards where necessary, for two purposes: (1) to enable the state to determine, according to its law, whether there is sufficient unappropriated water available for the project; and (2) to give notice to the state of the scope of the project.

His judgment provides:

> (1) The United States can appropriate unappropriated water necessary for use in any federal reclamation project within the State of California, but must first, in accordance with comity, apply to the California State Water Resources Control Board for a determination by that Board of the availability of unappropriated water.
>
> (2) When the United States submits applications to the California State Water Resources Control Board, that Board must grant such applications if unappropriated waters are available.

We agree with this result, but we do not agree that the requirement is one of comity. It is a legal requirement of § 8.

Under § 8, the national government, in constructing and administering reclamation projects, must recognize and cannot nullify either water rights created by state laws or the laws that create them. But enforcement of the government's duty via the permit device is not handed over to the state.

The phrase "in accordance with comity" is stricken from paragraph (1) of the judgment. In all other respects, the judgment is affirmed.

CARTER, Circuit Judge, concurring specially:

I concur in the above opinion. *Hancock v. Train,* 426 U.S. 167, 44 U.S.L.W. 4767 (June 7, 1976), and *Environ-*

mental Protection Agency v. California ex rel. State Water Resources Control Board, 426 U.S. 200, 44 U.S.L.W. 4781 (June 7, 1976), make improper, under existing statutes, any state requirements in the nature of permits. The cases hold that it is for the Congress to explicitly determine whether to subject federal agencies to state permits.

I would suggest, however, that it may be one thing for the Congress to provide that a state may require a permit to assure proper air or water quality standards of a federally-owned or operated installation; it is quite another thing to permit a state to require permits for the very operation of such a facility. I cannot envision the Congress providing that the states, by a permit process, may control the operation of federally constructed, funded, and operated water and power projects.

WALLACE, Circuit Judge, Concurring and Dissenting:

Although recent Supreme Court decisions leave me with no clear concept of what Congress must say in order to require the federal government to comply with state law, I am persuaded that the language of the state reviewed here is insufficient to validate California's permit procedure. While the "shall" in section 8 of the 1902 Reclamation Act appears to be mandatory, and while the Bureau of Reclamation's conduct over nearly three-quarters of a century indicates that it had no doubt of the necessity for compliance with state law, I cannot say that the language of the section is any clearer or less equivocal than that rejected as insufficient in *Hancock v. Train,* 426 U.S. 167 (1976), and *EPA v. California ex rel. State Water Resources Control Board,* 426 U.S. 200 (1976). Thus, with reluctance I concur that the statute does not require the Bureau of Reclamation to secure, pursuant to state law, the permit in question.

However, unlike the majority,[1] I would go no further. Nothing in *Hancock* or *EPA* necessarily forecloses federal compliance with state-imposed requirements not involving permits. Indeed, the more than 70 years of cooperative development of water resources in the West under the Reclamation Act attest to the wisdom in providing non-exclusive control over this limited asset.

Also, I believe that we must disapprove that portion of the district court's order that requires the federal government, "in accordance with comity, [to] apply to the California State Water Resources Control Board for a determination by that Board of the availability of unappropriated water" and that requires the Board to "grant such applications if unappropriated waters are available." *United States v. State of California, supra,* 403 F. Supp. at 902. By construing section 8 under compulsion of *Hancock* and *EPA* as not requiring Bureau of Reclamation compliance with state appropriation procedures, we bring an element of uncertainty to the administration of water resources. Absent some mechanism to convey the information, the states cannot know what amount of unappropriated

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1. The majority's approach to the permit issue seems to be premised on the belief that the impermissible aspect of the state's scheme is not the permit requirement but rather the *conditions* the state has attached to the permit. California has conceded all along that, although the Bureau must seek and secure a permit, the state has no power to attach to the permit conditions inconsistent with or contradictory to congressional purposes underlying the particular reclamation project. California believes, however, that no such conflict exists in this case.

In a proceeding before a state agency, it was determined that the conditions imposed by California were valid. The federal government did not appeal this decision. Accordingly, the government conceded at oral argument that it is precluded by the doctrine of res judicata from raising the issue anew in this case.

water remains for private use in a watershed after a portion is appropriated by the Bureau. The "comity" theory and application/notice requirement of the district court are an effort to patch this tear caused by the new construction of section 8.

It is a wayward effort. Comity is a concept of deference and voluntary action. *Zink v. Estelle,* 403 F. Supp. 656, 659 (S.D. Tex. 1975); *Galloway v. Watts,* 395 F. Supp. 729, 731 (D. Md. 1975). To use such a concept as a basis for *requiring* affirmative federal action seems peculiarly incongruous. Accordingly, I agree with the majority's disapproval of the district court's comity theory.

But the majority does no better in its effort for it provides no defensible basis for requiring federal agency action. Accordingly, I must reject that portion of the majority's opinion which directs the federal government "to comply with the *forms* of state law" (emphasis added) because "[i]t is a legal requirement of § 8." Majority op. at 6.[2]

Concededly where two sovereigns, acting independently, administer water rights in the same watershed, there is a great potential for uncertainty. But that is what our *Hancock*- and *EPA*-inspired construction of section 8 means.

2. While the majority fails to provide us with any legal reasoning for requiring compliance with "the forms of state law," I can only assume that the requirement is derived from federal common law. Before embarking on this new and uncharted course of constructing common law, I would ask: Do we have the legal competency to fashion any rules in this area? Even if we do, is it wise for us to undertake the task? While I entertain doubts that the first question can be answered affirmatively, I am convinced that we ought not undertake the task of judicial rulemaking in an area as complex and sensitive as state-federal relations over water.

If my assumption regarding the federal character of the application/notice requirement is incorrect, then that requirement must be viewed as one of state law. If derived from state law, there would be an inconsistency with the majority's initial conclusion that section 8 does not require federal agency compliance with state permit procedures.

The majority has failed to find a defensible legal basis to give effect to its desire to avoid this problem. Unfortunately, I can see no such basis either. Accordingly, we have, I believe, no alternative but to leave it to the legislative branch to devise a solution. Therefore, I would go no further than to disapprove the permit procedure in question.

Appendix 2

United States Court of Appeals
For the Ninth Circuit

AUG 12 1977—

Emil E. Melfi, Jr. Clerk
U. S. Court of Appeals

United States of America, Plaintiff-Appellee, vs. The State of California, State Water Resources Control Board, W. W. Adams, Chairman, Ronald B. Robie, Vice Chairman, Roy E. Dodson, Jean Auer, and W. Don Maughan, as members of the State Water Resources Control Board, Defendants-Appellants.	No. 75-3554

OPINION

Appeal from the United States District Court
for the Eastern District of California

On Petition for Rehearing

Before: DUNIWAY, CARTER and WALLACE,
Circuit Judges

DUNIWAY, Circuit Judge:

In its petition for a rehearing, California relies upon an argument that it made, but did not emphasize, in its briefs on appeal, an argument that we overlooked. It points

to the fact that certain of the permits involved in this case had their origin in two applications filed by the State Department of Finance. These applications were then assigned by the Department to the Bureau of Reclamation. The State points out that its Department of Finance, had it prosecuted the applications to the obtaining of permits, would certainly have been bound by whatever conditions the State Board might impose. It follows, says the State, that the Bureau, assignee, is also subject to those conditions because, as assignee, it could acquire no greater rights than its assignor. The argument is superficially appealing, but, on reflection, we reject it.

The argument overlooks two considerations. The first is that the assignment was of an application, not of a permit containing conditions. The second is that the assignee was the Bureau, a Federal agency exercising powers conferred upon it by the Congress of the United States, whose valid enactments are "the supreme law of the land" (U.S. Const. Art. VI, § 2).

Under California law, an application for a permit to appropriate surplus or unappropriated water confers nothing upon the applicant as against the state; all that it confers is a priority over later applicants if the application is granted. Cal. Water Code § 1450 states:

> Any application properly made gives to the applicant a priority of right as of the date of the application until such application is approved or rejected. Such priority continues only so long as the provisions of law and the rules and regulations of the board are followed by the applicant.

Cal. Water Code § 1455 then adds: "The issuance of a permit continues in effect the priority of right as of the date of the application. . . ."

The Supreme Court of California interpreted these provisions in *Madera Irrigation District v. All Persons,* 1957, 47 Cal.2d 681, 690, 306 P.2d 886, *rev'd* on other grounds, *Ivanhoe Irrigation District v. McCracken,* 1958, 357 U.S. 275. There the court stated:

> The filing of an application under the present law is comparable and of like effect to the posting and recording of notice or commencement of actual construction work under the rules which had previously prevailed. . . . The Water Code provides that the effect of filing an application confers, for all practical purposes, a priority only.

To the same effect, see *United States v. Fallbrook Public Utility District,* S.D. Cal., 1958, 165 F. Supp. 806, where Judge James M. Carter stated (at 855):

> Until the application to appropriate is acted upon by the State Water Rights Board favorably to the applicant, and the issuance of a permit is directed, the applicant has no property right of any kind as against the state. He has an inchoate, incipient, conditional right of procedural priority over later applicants. . . .

That is all that the State Department of Finance had, and all that it could assign to the Bureau.

When the Bureau became the assignee of that "inchoate, incipient, conditional right," it was acting in the same capacity as when it filed its own applications. It was acting under the same Federal laws, and, absent those laws, it would have had no right to appropriate any water. Its substantive rights arose from the Congressional legislation, not from the assignment. There is no contention that the assignment was expressly conditioned upon acceptance of whatever permit conditions the State might impose. On the contrary, the State's briefs make it clear that the State Department of Finance filed the applications for one purpose only, to obtain, not for itself, but for the Bureau when

the project finally went forward, a priority date as appropriator.[1]

We conclude that the Bureau, as assignee of an application, is no more subject to the imposition of conditions by the Board than it is as an original applicant.

The petition for a rehearing is denied.

WALLACE, Circuit Judge, concurring in part:

I concur in part. Concluding that the first of Judge Duniway's reasons to deny the petition is more than adequate

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1. Originally, the Central Valley Project, of which New Melones is a part, was to be constructed and operated by the State. Therefore, as California told us in its opening brief, its Department of Finance began in 1927 filing applications for permits to appropriate water for the Central Valley Project,

> so that the State—in anticipation of State construction of the CVP—could obtain a prior right to the use of water, as against private appropriators who submitted later applications; . . . .
> (Brief, page 5)
> As noted earlier, Decision 1422 approved the assignment of two applications to the Bureau, and issued permits to the Bureau on the basis of these applications; these applications had originally been filed by a State agency for the purpose of obtaining an early priority date.
> (Brief, pages 83-84)

There is a similar assertion in California's Reply to Response to Petition for Rehearing, page 6:

> [T]he State Department of Finance, in applying for water rights in 1927, did not apply for the purpose of ultimately encumbering the Bureau's water rights. Rather, it applied because it was expected that the State rather than the federal government would build and operate the Central Valley Project, and the State wanted to obtain the earliest possible priority dates in its own water rights.
> (footnote omitted)

It was apparent in 1944 that New Melones was to be built and operated as a Federal Project. It was authorized in the Flood Control Act of 1944, 58 Stat. 887. See also § 203 of the Flood Control Act of 1962, 76 Stat. 1191. Thus, when the State applied for water rights for New Melones in 1952, its purpose was, as it says, to obtain early priority dates, and its intent must have been to do what it ultimately did, to assign its applications to the Bureau of Reclamation, which was to build and operate the project.

("the assignment was of an application, not of a permit containing conditions"), I would not reach the constitutional issue. *See Ashwander v. Tennessee Valley Authority,* 297 U.S. 288, 341 (1936) (Brandeis, J., concurring).

Appendix 3

Section 8 of the Reclamation Act of 1902:

> "That nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws, and nothing herein shall in any way affecting any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof: *Provided,* That the right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right." 32 Stat. 390 (1902); 43 U.S.C. §§ 372, 383 (1970).